

UNITED STATES DISTRICT COURT  
DISTRICT OF MASSACHUSETTS

LEXINGTON INSURANCE COMPANY AND  
NATIONAL UNION FIRE INSURANCE COMPANY OF  
PITTSBURGH PA,

PLAINTIFF,

V.

VIRGINIA SURETY COMPANY, INC.

DEFENDANTS.

CIVIL ACTION No. 04-11109 RGS

**JOINT RECOMMENDATION OF DEFENDANT VIRGINIA SURETY COMPANY, INC. AND  
PLAINTIFFS LEXINGTON INSURANCE COMPANY AND NATIONAL UNION FIRE  
INSURANCE COMPANY OF PITTSBURGH, PA, REGARDING THE ORDER OF THE COURT  
OF APPEALS**

Defendant Virginia Surety Company, Inc. ("VSC") and Plaintiffs Lexington Insurance Company ("Lexington") and National Union Fire Insurance Company of Pittsburgh, Pa. ("NUFIC")(collectively, the "Parties"), hereby submit the following joint recommendation regarding how the court should proceed in light of the Order of the Court of Appeals for the First Circuit dated August 10, 2007:

1. The Order on the Parties Cross-Motions for Summary Judgment, entered by this Court on May 3, 2007 provided that, "[t]he Parties will discharge their obligations in a manner consistent with the court's declaration." To protect their right to appeal, Lexington and NUFIC filed a Notice of Appeal on May 31, 2007. VSC moved to dismiss the appeal, arguing that this Court's Order is non-final and thus not appealable. Finding some ambiguity

regarding the final effect of the Order and its appealability, the Court of Appeals asked this Court to clarify the intended finality of the Order.

2. The Parties agree that the Order on the Parties' Cross-Motions for Summary Judgment, entered by this Court on May 3, 2007, did not dispose of all the Parties' claims in this action. In particular, the Order of May 3, 2007, did not make any findings regarding the damages sought by VSC or the appropriate amount of prejudgment interest, if any.
3. The Parties are currently proceeding in a good faith to attempt to negotiate a settlement of the issues in the action. In particular, the Parties are attempting to at least reach agreement regarding the amount of defense and indemnity payments that were made by VSC in claims that were also covered by policies issued by NUFIC, for which VSC seeks reimbursement from NUFIC, together with the appropriate amount of prejudgment interest, if any.
4. The Parties do not wish, at this time, to file a Motion under F.R.Civ.P 54(b) regarding the appealability of the May 3, 2007 Order of this Court.
5. The Parties recommend that this Court clarify to the Court of Appeal that the issue of damages is still pending before the District Court, and that the May 3, 2007 Order was not intended to constitute a final, appealable order.
6. In order to facilitate the ongoing settlement discussions in this matter, the Parties also request that the Court allow the parties 45 days from the date jurisdiction of this matter is restored to the District Court, before scheduling any further proceedings in this action. If

all of the issues in the case are not resolved within this 45 day period, the Parties request that a further Status Conference be set to determine a schedule for further proceedings in this action.

Respectfully Submitted,

VIRGINIA SURETY COMPANY, INC.

By its attorneys,

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Date: August 20, 2007

LEXINGTON INSURANCE COMPANY AND  
NATIONAL UNION FIRE INSURANCE COMPANY  
OF PITTSBURGH, PA.,

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Date: August 20, 2007